Supreme Court, U.S.
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No. 06-977

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In the Supreme Court of the United States

HUGH WOLFENBARGER, WARDEN,

Petitioner,

v.

WYNN SATTERLEE,

Respondent

On Petition For Writ Of Certiorari
To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Here the federal district court granted habeas corpus relief on the basis of a constitutional violation affecting the state criminal sentence, but subsequently ordered the conviction itself vacated and expunged, and the Court of Appeals affirmed this relief. The question presented is:

> Does a federal habeas corpus court have authority to order a state conviction vacated and expunged when the constitutional violation that forms the basis for habeas corpus relief affects only the sentence, and not the conviction?

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OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion of the District Court granting habeas relief is reported at 374 F Supp 2d 562. App 25a. The opinion of the Court of Appeals is reported at 453 F 3d 362. App 1a.

Other opinions and orders of the District Court attached to this Petition for Writ of Certiorari are:

- Opinion and Order Granting an Evidentiary Hearing, of the United States District Judge, Eastern District Michigan No. 03-CV-1682-AJT, issued April 15, 2005. App 15a.

- Order Setting Conditions of Release, Eastern District Michigan No. 03-CV-71682-AJT issued July 8, 2005. App 39a.

- Order of the District Court Denying a Stay and Granting an Unconditional Writ, Eastern District Michigan No. 03-CV-71682-AJT issued October 19, 2005. App 42a.

JURISDICTION

Respondent, a state prisoner, commenced this action in the United States District Court for the Eastern District of Michigan, pursuant to 28 USC § 2254, by filing a petition for writ of habeas corpus on April 30, 2003. An evidentiary hearing was held on June 1, 2005. The District Court issued an opinion and order that granted the petition on June 23, 2005. (App 25a) Petitioner filed a notice of appeal pursuant to 28 USC § 2253. On June 30, 2006 the Sixth Circuit Court of Appeals affirmed. (App 1a) Petitioner filed a motion for rehearing, and on October 13, 2006 the Court of Appeals denied the motion. This Court has jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 USC § 2243 provides:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

Respondent, Wynn Satterlee, was charged in Michigan with delivery of cocaine. He was released on bond prior to trial. Although plea negotiations were conducted, no agreement was reached, and Satterlee was tried and convicted of delivery of over 650 grams of cocaine, and was sentenced to 20 to 30 years in prison pursuant to Michigan's indeterminate sentencing system. The State appellate courts affirmed the conviction.

Following his direct appeals, Satterlee received a copy of a letter from his trial attorney addressed to him, and dated before his trial, noting that the prosecutor was offering a sentence "in the 3-7 year range with cooperation, or alternatively seven years without cooperation." Satterlee filed a post-judgment motion, claiming that he had never received the letter, and if he had known that he could have entered a guilty plea and received a sentence with a three year minimum and a seven year maximum, he would have taken the prosecutor's offer. When his post judgment motion and subsequent appeals were unsuccessful, Satterlee filed a petition for habeas corpus relief, claiming that his trial attorney was ineffective for failing to notify him of the plea offer, and that his appellate counsel was ineffective for failing to raise this claim on direct appeal.

The District Court granted an evidentiary hearing at which the prosecutor and Satterlee's trial attorney testified that the "sentence in the 3-7 year range" mentioned in the letter referred only to the minimum sentence. The prosecutor also testified that on the morning of Satterlee's trial, he had offered a 6-20 year sentence in exchange for Satterlee's guilty plea. He stated that defense counsel had gone to the counsel table and had spoken to Satterlee, then returned to say that the offer was rejected. Satterlee testified that he had not received the letter and that his attorney did not tell him of the 6-20 year offer just prior to trial. Satterlee's trial attorney could not recall the details of the case, but testified that if an offer from the

prosecution had been made, he would have communicated that offer to his client.

The District Court granted the writ, finding Satterlee's trial attorney ineffective for failing to notify Satterlee of the 6-20 year sentence offer on the morning of the trial. The District Court's order was conditioned upon the State extending the 6-20 year sentence to Satterlee within 60 days. Two weeks after granting relief, the District Court granted bond and ordered Satterlee's release. The State appealed the grant of the writ.

When 60 days elapsed and the State had not offered Satterlee the sentence bargain, the District Court granted unconditional habeas relief and ordered the State to expunge Satterlee's conviction. The State also appealed this order.

The Court of Appeals affirmed, but remanded the case to the District Court to clarify its decision to state whether reprosecution would be permitted and if not, to state its reasons for prohibiting reprosecution.

When a federal court orders habeas corpus relief on the basis of a constitutional violation affecting only a state criminal sentence, an important federal question concerning the federal court's authority is presented when the court subsequently orders the underlying state conviction vacated and expunged. S Ct R 10(c).

ARGUMENT

The grant of relief in this case entitled Satterlee to the benefit of the plea bargain: a sentence of 6-20 years rather than the 20-30 years he received after trial. The Michigan Parole Board has exclusive authority to parole a state prisoner prior to completion of his maximum sentence. Here, where Satterlee had served 6 ½ years when the writ was granted, the District Court's order of release two weeks after granting the writ and the order to expunge the conviction usurped the authority of the Michigan Parole Board and is contrary to the respect owed to the State courts in the consideration of State prisoners claims in federal habeas corpus.

The District Court found in this case that Satterlee's trial counsel was ineffective for failing to present a plea bargain offer made by the prosecution on the morning of the first day of trial. According to the District Court, Satterlee would have taken advantage of the opportunity and would have pleaded guilty to the offense in exchange for the 6-20 year sentence offered. Because the offer was premised upon a plea to the crime charged and not to a lesser offense, the practical difference in outcome was that Satterlee would have been serving a sentence of 6-20 years, rather than the 20-30 year sentence he received following his conviction at trial. While the case was pending in the District Court, Satterlee completed six years in prison.

The District Court's order of habeas relief was conditional. It stated, "unless the State takes action to offer Petitioner a plea offer with a sentence agreement of six to twenty years within sixty (60) days of the date of this opinion, he may apply for a writ ordering Respondent to release him from custody forthwith." (App 38a)

Michigan law allows the State to retain custody of a prisoner for the full term of the maximum sentence. Release after the minimum term is served but prior to the maximum may be granted at the discretion of the Michigan Parole Board.[1] Therefore, if Satterlee had been serving the 6-20 year sentence offered, he would, at the time of the District Court's grant of habeas relief, have become eligible for parole consideration. Two weeks after the issuance of the opinion and order granting the writ, the District Court ordered Satterlee's release from State custody.[2]

At the expiration of 60 days, the State had not offered the plea bargain to Satterlee, who was still at large. Because Satterlee had already been effectively paroled by the District Court, and because the case was pending on appeal, the State did not disturb the status quo. Satterlee, however, moved the District Court to issue an unconditional writ. The State moved for a stay pending a decision on the appeal the State had filed in the Sixth Circuit Court of Appeals. The District Court issued an order making the writ unconditional, ordering that Satterlee's conviction—not just the sentence—be vacated, and the record expunged. The Court also ordered the clerk of the State court that convicted Satterlee to send a copy of its order to any person or agency that was notified of Satterlee's arrest or

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[1] *People v Drohan*, 475 Mich 140, 154 (2006).

[2] Contrary to statements in the Court of Appeals opinion and in spite of the State's best efforts to apprise the Appellate Court in its briefs and at oral argument, the release did not occur as a result of the State's failure to offer the plea bargain within 60 days. The District Court released Respondent over a month prior to the deadline imposed for the State to offer the plea bargain to Petitioner.

conviction, and to file a certificate of compliance with the District Court. (App 46a)

The Court of Appeals opinion affirming the grant of habeas relief also affirmed the relief ordered, but found that the District Court's order was ambiguous regarding whether the State was entitled to reprosecute Satterlee. The case was remanded to the District Court to clarify its decision regarding reprosecution, and if reprosecution is forbidden, to justify that decision.

The federal writ of habeas corpus is a challenge to custody.[3] In the case of state prisoners, the vast majority of cases involve allegations of constitutional error at trial, and the remedy if such error is found, and not deemed harmless, is the release of the prisoner.[4] The habeas statute, however, directs the federal courts to grant relief "as law and justice require."[5] Satterlee's unconditional release was unjustified. His claim was not that constitutional error occurred at his trial, rendering his conviction on the cocaine charge invalid. His claim was that the ineffectiveness of his trial attorney deprived him of the opportunity to enter a plea to the charge, and thereby to have been given a shorter sentence. Thus Satterlee was challenging the duration of his confinement, but not the constitutionality of his conviction. Most courts considering claims involving counsel's failure to notify the client of a plea offer have determined that the proper remedy is to reinstate the offer,[6] reflecting the general principle, as stated by this Court, that, "the remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[7]

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[3] 28 USC § 2254(a).

[4] *Brecht v Abrahamson*, 507 US 619 (1993).

[5] 28 USC § 2243.

[6] *United States v Blaylock*, 20 F3d 1458, 1468-1469 (CA 9, 1994); *Magana v Hofbauer*, 263 F3d 542, 553 (CA 6, 2001).

[7] *Lewis v Casey*, 518 US 343, 357 (1996).

Because Satterlee's claim was only as to the length of his sentence and not the validity of his conviction, the release of Satterlee in contravention of the authority of the Michigan Parole Board to govern the parole of State prisoners, and the order to vacate and expunge the conviction were unjustified by the injury suffered and contrary to the State's sovereign interest in punishing offenders and its "good faith attempts to honor constitutional rights."[8]

The District Court's immediate release was therefore a usurpation of the authority of the Michigan Parole Board, which may or may not have granted parole in its discretion.[9] Even in cases arising on direct review, this Court has cautioned that remedies for a violation of the right to counsel should be tailored to the injury suffered[10]:

> [W]ithout detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.

Here, where the injury suffered was only the length of the sentence, the district court orders granting release and vacating the conviction were offensive to the principles of comity and federalism that underlie this Court's habeas jurisprudence.

Even if vacating Satterlee's conviction is regarded as a sanction imposed on the State for its failure to extend the plea

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[8] *Calderon v Coleman*, 525 US 141, 145-146 (1998) quoting *Brecht*, 507 US at 635.

[9] MCL 791.235(1).

[10] *United States v Morrison*, 449 US 361, 364 (1981).

offer within 60 days, it is unjustified. First, the issuance of conditional habeas orders, which require the State to release a habeas petitioner from custody unless the State commences a retrial within a specified period of time, are accommodations to the State's interest in continuing custody, and not positive commands to the State warranting sanctions beyond the remedy justified by the violation found.[11] Therefore, the State's willingness to accept Satterlee's release pending appeal was no offense to the District Court's conditional order. Moreover, in *Morrison*, this Court rejected the notion that a remedy beyond the injury suffered is warranted even for an egregious violation of Sixth Amendment rights. Here, where the nature of Satterlee's claim involved the length of his sentence only, the order of release by the District Court was contrary to the State's interest in enforcing its parole regulations, was unjustified by the constitutional violation found by the District Court, and injurious to the respect for coordinate judicial systems.

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[11] See *Wilkinson v Dotson*, 544 US 74, 87 (2005) (concurring opinion of Scalia, J.)

CONCLUSION

For the reasons stated above, the State requests this Court to grant certiorari and reverse the judgments vacating the conviction and ordering expungement.

Respectfully submitted,

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Dated: January 2007

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 06a0218p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WYNN SATTERLEE,
Petitioner-Appellee,
v.

HUGH WOLFENBARGER,
Respondent-Appellant.

Nos. 05-2013/2513

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 03-71682—Arthur J. Tarnow, District Judge.

Argued: June 9, 2006

Decided and Filed: June 30, 2006

Before: MOORE, COLE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Janet A. VanCleve, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellant. James Sterling Lawrence, Royal Oak, Michigan, for Appellee. **ON BRIEF:** JanetA. VanCleve, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellant. James Sterling Lawrence, Royal Oak, Michigan, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. These consolidated appeals concern the grant of habeas relief to Petitioner-Appellee Wynn Satterlee, a Michigan state prisoner who was convicted by jury and sentenced after his trial counsel failed to inform him of a favorable plea offer. The district court initially granted a conditional writ, ordering the state to reinstate the plea offer that Satterlee never received. When the state failed to comply, the district court granted an unconditional writ, ordering Satterlee's immediate release and the expungement of his record of conviction.

In No. 05-2013, the state challenges the judgment granting the conditional writ, arguing that Satterlee failed to exhaust state-court remedies and that the district court made a clearly erroneous factual finding. Because the state's arguments are without merit, we **AFFIRM**.

In No. 05-2513, the state challenges the judgment granting the unconditional writ, arguing that the remedies of immediate release and expungement exceeded the district court's power. Because the state's arguments are once again without merit, we **AFFIRM**, albeit with instructions to clarify an ambiguity in the unconditional writ, which is discussed below. We **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

Satterlee was convicted by a Michigan jury of conspiring to deliver more than 650 grams of cocaine and was sentenced to twenty to thirty years' imprisonment. Satterlee appealed on grounds not relevant here. The Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied

leave to appeal. *People v. Satterlee*, No. 217262, 2000 WL 33521090 (Mich Ct. App. Mar. 28, 2000); *People v. Satterlee*, 659 N.W.2d 227 (Mich. 2000) (table decision).

Satterlee moved for relief from judgment pursuant to Michigan Court Rule 6.502, arguing, inter alia, that he was denied his Sixth Amendment right to the effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), and Hill v. Lockhart, 474 U.S. 52 (1985), when his trial attorney, David Dodge, failed to relay to Satterlee a favorable plea offer that he would have accepted. The state trial court denied relief, and both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. Joint Appendix ("J.A.") at 93 (Circuit Court decision);[1] J.A. at 199 (Court of Appeals decision); *People v. Satterlee*, 661 N.W.2d 241 (Mich. 2003) (table decision).

Satterlee filed a petition for a writ of habeas corpus. The district court conducted an evidentiary hearing, where Dodge, John Cipriani (the state prosecutor in Satterlee's case), Satterlee, and Margaret Satterlee (Satterlee's mother) testified. *Satterlee v. Wolfenbarger* (*Satterlee I*), 374 F. Supp. 2d 562, 570-74 (E.D. Mich. 2005) (ordering an evidentiary hearing); J.A. at 270-385 (Evid. Hr'g Tr.). The district court made two findings of fact: (1) "the prosecutor made a plea offer on the day of trial to allow petitioner to plead guilty in exchange for a sentence of six to twenty years"; and (2) "the plea offer of six to twenty years was never communicated to petitioner by his attorney David Dodge." *Satterlee I*, 374 F. Supp. 2d at 568-69. These factual findings were based largely on the determination that Satterlee, his mother, and Cipriani were more credible than Dodge. *Id.*

The district court concluded that "there is a reasonable probability that petitioner would have accepted the plea offer

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[1] The joint appendices filed in these two appeals are virtually identical. For the sake of simplicity, we cite only to the joint appendix filed in No. 05-2013.

that was made in this case." Relying on our decision in *Griffin v. United States*, 330 F.3d 733 (6th Cir. 2003), which had in turn relied on *Strickland* and *Hill*, the district court granted a conditional writ based on Satterlee's ineffective-assistance-of-counsel ("IAC") claim. *Id.* at 567, 569. The district court gave the state sixty days to reinstate the six-to-twenty-year plea offer. *Id.* at 569-70. The state appeals this order in No. 05-2013, arguing that Satterlee failed to exhaust state-court remedies and that the district court made a clearly erroneous factual finding.

When the conditional writ's sixty-day deadline passed, Satterlee applied for his immediate release, to which the state responded by filing a motion in the district court for a stay pending its appeal in No. 05-2013. The district court denied the state's motion for stay and granted Satterlee an unconditional writ, ordering his immediate release and the expungement of the record of his conviction. *Satterlee v. Wolfenbarger* (*Satterlee II*), No. Civ. 03-71682-DT, 2005 WL 2704877 (E.D. Mich. Oct. 19, 2005). The state appeals this order in No. 05-2513, arguing that the remedies of immediate release and expungement exceeded the district court's power.

II. STANDARD OF REVIEW

In a habeas proceeding, we review de novo the district court's legal conclusions, including its ultimate decision to grant or deny the writ, and we review for clear error its factual findings. *Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004), *cert. denied*, — U.S. —, 126 S. Ct. 353 (2005); *Sawyer v. Hofbauer*, 299 F.3d 605, 608 (6th Cir. 2002).

III. THE CONDITIONAL WRIT (No. 05-2013)

A. Exhaustion/Fair Presentment

The state first argues that Satterlee did not satisfy the exhaustion requirement. A writ of habeas corpus may not be granted unless the petitioner has exhausted available state-court

remedies. 28 U.S.C. § 2254(b)(1). In order to satisfy the exhaustion requirement, "a petitioner's claim must be 'fairly presented' to the state courts before seeking relief in the federal courts." *Whiting v. Burt*, 395 F.3d 602, 612 (6th Cir. 2005) (citing *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Picard v. Connor*, 404 U.S. 270, 275 (1971)). "It is sufficient if 'the substance of a federal habeas corpus claim' be presented to the state courts, and there are instances in which 'the ultimate question for disposition' will be the same despite variations in the legal theory or factual allegations urged in its support." *Id.* at 612-13 (quoting *Picard*, 404 U.S. at 277-78). Whether a habeas petitioner has satisfied the exhaustion requirement is a question of law that we review de novo. *E.g.*, *Morris v. Dretke*, 413 F.3d 484, 491 (5th Cir. 2005); *Stevens v. Delaware Corr. Ctr.*, 295 F.3d 361, 368 (3d Cir. 2002); *Greene v. Lambert*, 288 F.3d 1081, 1086 (9th Cir. 2002); *Fortini v. Murphy*, 257 F.3d 39, 44 (1st Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002).

The state concedes that Satterlee's legal theory — that he was denied his Sixth Amendment right to the effective assistance of counsel under *Strickland* and *Hill* when his trial attorney failed to relay a favorable plea offer — was fairly presented to the state courts. Appellant Br. (05-2013) at 20. Its exhaustion argument is instead premised on the contention that Satterlee did not fairly present to the state courts the factual allegations underlying his legal theory. According to the state, although the district court granted the writ based on Dodge's failure to relay a six-to-twenty-year offer made the morning of trial ("morning offer"), before the state courts Satterlee relied on Dodge's failure to relay a different offer - one that Dodge allegedly sent via letter to Satterlee a week before trial ("letter offer"). Thus, the state argues, Satterlee did not fairly present his IAC claim to the state courts.

The state's argument is without merit, as it is wrong on the facts. Although his IAC argument in the state post-conviction proceedings focused on the letter offer, Satterlee also notified the state courts of the morning offer:

> There will be some factual disputes to be resolved at a hearing. The letter of David Dodge of November 30, 1998, which Defendant received only after being convicted and sentenced, refers to a plea offer of 3 to 7 years. Yet, present counsel spoke by telephone with prosecutor John Cipriani, and *Mr. Cipriani states* that there was never a plea offer of 3 to 7 years, but *that there was a plea offer of 6 to 20 years*. (See affidavit of James Lawrence). Something peculiar is going on here, where attorney Dodge after sentence comes up with letters never before seen by Defendant, allegedly advising him of an offer, yet the prosecutor says that offer was never made. At this point, Defendant and his counsel are unsure of who to believe, prosecutor Cipriani or attorney Dodge, who directly contradict each other. An evidentiary hearing is clearly needed.

J.A. at 104 (Br. in Supp. of Mot. for Relief from J. at 2 n.1) (emphases added), 155 (Br. in Supp. of Application for Leave to Appeal at 5 n.1) (emphases added). Therefore, Satterlee informed the state courts of Dodge's failure to relay *both* plea offers, and the relief eventually granted by the district court was based on one of them. Accordingly, Satterlee fairly presented both the legal and factualbases of his IAC claim to the state courts.[2]

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[2] Moreover, the IAC claim would be exhausted even if the state were right on the facts (i.e., if Satterlee had not informed the state courts of the morning offer). The Supreme Court has explained that "presentation of additional facts to the district court, pursuant to that court's directions, [does not] evade[] the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts," so long as "the supplemental evidence presented by [the prisoner] d[oes] not fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 257-58, 260 (1986). The purportedly new evidence of the morning offer does not "fundamentally alter" the claim that Dodge failed to relay a favorable plea offer that Satterlee would have accepted, as it would fit

B. Factual Findings/Credibility

The state next objects to a factual finding made by the district court. We review for clear error a factual finding made pursuant to a habeas court's evidentiary hearing. *Carter v. Mitchell*, 443 F.3d 517, 535 (6th Cir. 2006); *Sawyer*, 299 F.3d at 608. "'A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Norris v. Schotten*, 146 F.3d 314, 323 (6th Cir.) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)), *cert. denied*, 525 U.S. 935 (1998). "If there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Caver v. Straub*, 349 F.3d 340, 351 (6th Cir. 2003) (quoting *United States v. Kellams*, 26 F.3d 646, 648 (6th Cir. 1994)). We afford the district court particular deference when its factual findings are based on credibility determinations. *Moss v.United States*, 323 F.3d 445, 457 (6th Cir.), *cert. denied*, 540 U.S. 879 (2003); *United States v.Oliver*, 397 F.3d 369, 374 (6th Cir. 2005).

After conducting an evidentiary hearing, the district court found that Satterlee, his mother, and Cipriani were all more credible than Dodge. *Satterlee I*, 374 F. Supp. 2d at 568-69. Thus, the court concluded that Dodge did not inform Satterlee of the morning offer. *Id.* at 568. The state contends that this factual finding was clearly erroneous, arguing that Satterlee was not credible because three statements he made at the evidentiary hearing were inconsistent with either his prior pleadings or other parts of his testimony at the hearing.

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comfortably within the rule that "[u]nder *Vasquez* and allied decisions, the petitioner may supplement and clarify the record, *inter alia*, through . . . introduction of new factual materials supportive of those already in the record [or] presentation of additional instances of the same alleged violation." 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.3c, at 1088-89 (5th ed. 2005) (footnotes omitted).

The state first claims that Satterlee changed his story about where he was when Dodge allegedly mailed the letter offer. According to the state, Satterlee claimed before the state courts and in his federal habeas petition that he was in Nevada, but at the evidentiary hearing he admitted he was in Michigan. The first half of the state's contention is true, as Satterlee did in fact claim in his filings that he was in Nevada. J.A. at 26 (Br. in Supp. of Pet. for Habeas Corpus at 4), 78 (Satterlee Aff. ¶ 6), 104 (Br. in Supp. of Mot. for Relief from J. at 2), 154 (Br. in Supp. of Application for Leave to Appeal at 4). Satterlee did *not*, however, contradict this position at the evidentiary hearing.

Satterlee was never asked for his whereabouts at the time the letter offer was allegedly mailed, so he never even had the *opportunity* to contradict himself.[3]

The state next contends that at the hearing Satterlee denied ever being notified of a seven-to-twenty-year plea offer, even though elsewhere in his testimony he admitted to receiving a letter containing such an offer.[4] This time the second half of the state's assertion is correct, as Satterlee did in fact acknowledge receiving a letter containing a seven-to-twenty-year plea offer. *See* J.A. at 375 (Evid. Hr'g Tr. at 106) (referring to letter dated Sept. 16); J.A. at 73-74 (Letter of Sept. 16, 1998) (relaying the offer); *see also* J.A. at 77 (Satterlee Aff. ¶ 4) (acknowledging awareness of the offer). As for the first part of its assertion (i.e., that Satterlee ever denied being informed of the offer), the state offers no citation to the record in support, but it presumably relies on the following exchange during the direct examination of Satterlee:

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[3] Instead, Satterlee was simply asked whether the address on the letter was correct, and he testified that it was not. J.A. at 367, 374-75 (Evid. Hr'g Tr. at 98, 105-06).

[4] The letter discussed in this paragraph is different from the "letter offer."

> Q. At that time, at the time that you were sentenced, were you still unaware of any offer of six to 20 or seven to 20?
> A. No, I was not.
> Q. Were you aware or unaware?
> A. I was not aware of any offer.

J.A. at 373-74 (Evid. Hr'g Tr. at 104-05). On its face, this testimony would seem to support the state's assertion that Satterlee denied being aware of the seven-to-twenty-year offer and therefore contradicted himself. However, this exchange followed soon after a discussion of the morning offer of six to twenty years. *See* J.A. at 370-71 (Evid. Hr'g Tr. at 101-02). Up to that point in the testimony, the topic of the seven-to-twenty-year offer had not been raised. Given this context, it is likely that Satterlee understood the question's reference to the seven-to-twenty-year offer to be an inadvertent slip, with the question actually directed at the six-to-twenty-year (morning) offer that had just been discussed. Thus, it is difficult to conclude that Satterlee was inconsistent on this point. Finally, the state claims that Satterlee's testimony that he would have accepted the morning offer of six to twenty years is inconsistent with statements in various pleadings that he did not want a sentence with a twenty-year maximum. This time, the state gets both halves of its assertion right, as Satterlee both testified that he would have accepted the morning offer, J.A. at 371 (Evid. Hr'g Tr. at 102), and said in his filings that he did not want a sentence with a twenty-year maximum, J.A. at 27 (Br. in Supp. of Pet. for Habeas Corpus at 5), 77 (Satterlee Aff. ¶ 4), 103 (Br. in Supp. of Mot. for Relief from J. at 1), 155 (Br. in Supp. of Application for Leave to Appeal at 5 n.1). However, these two positions are not necessarily inconsistent, for at least two reasons. First, one may very well decide to accept a plea offer if its minimum sentence is low enough, even if its maximum sentence is otherwise unappealing. In other words, Satterlee could have found the morning offer's six-to-twenty-year term palatable because of its six-year minimum, even if he did not like the twenty-year maximum. Second, and more fundamentally, Satterlee testified that he "thought that . . . *the whole*

idea behind cooperating and doing everything they asked, giving statements, making trips to Lansing, *was to get the very best deal*; that *it was not to go to trial.*" J.A. at 371 (Evid. Hr'g Tr. at 102) (emphases added). Maintaining the negotiating position of being unwilling to accept a twenty-year maximum is consistent with the objective of obtaining the best possible deal, while accepting an offer of six to twenty years made immediately before trial is consistent with the objective of avoiding trial. *Cf. Griffin*, 330 F.3d at 738 ("[The defendant's] repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea."). Satterlee was not incredible simply because he had these two objectives, which are probably held by most criminal defendants.

The above analysis demonstrates that Satterlee never really contradicted himself. In any event, to the extent that certain statements were arguably inconsistent, we are not "'left with the definite and firm conviction that a mistake has been committed,'" *Norris*, 146 F.3d at 323 (quoting *Anderson*, 470 U.S. at 573), especially because the factual findings hinged on credibility determinations. Therefore, we conclude that the district court's findings of fact were not clearly erroneous. The state does not dispute that, given these facts, the state courts' denial of Satterlee's IAC claim "was contrary to, or involved an unreasonable application of, clearly established Federal law," i.e., *Strickland* and *Hill*. *See* 28 U.S.C. § 2254(d)(1). Accordingly, we affirm the grant of the conditional writ.

IV. The Unconditional Writ (No. 05-2513)

A. Unconditional Release

The district court issued a conditional writ, allowing Satterlee to apply for immediate release unless the state made within sixty days a plea offer of six to twenty years. *Satterlee I*, 374 F. Supp. 2d at 569-70. Because the state made no such offer in the allotted time, the district court granted an unconditional writ ordering Satterlee's immediate release.

Satterlee II, 2005 WL 2704877, at *3. The state contends that the district court did not have the power to order this remedy.

What the state appears to have forgotten is that *it did not comply with the conditional writ*. As a sister circuit has explained, "[c]onditional [writs] are essentially accommodations accorded to the state. They represent a [habeas] court's holding that a[n] . . . infirmity justifies petitioner's release. The conditional nature of the order provides the state with a window of time within which it might cure the . . . error." *Phifer v. Warden*, 53 F.3d 859, 864-65 (7th Cir. 1995). When the state fails to cure the error, i.e., when it fails to comply with the order's conditions, "[a] conditional grant of a writ of habeas corpus *requires* the petitioner's release from custody." *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985) (emphasis added); *accord, e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) ("Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release."); *Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998); *Phifer*, 53 F.3d at 864-65; 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 33.3, at 1684 (5th ed. 2005) ("If the state fails to act within the time set for retrial (or for some other proceeding) to occur, the petitioner must be released from custody immediately.").[5]

The state offers no authority contrary to those cited above; instead, it offers an argument that we reject for the

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[5] In accordance with these principles, this court has consistently endorsed the use of conditional writs, whether by affirming district courts that grant them, *e.g.*, *Madrigal v. Bagley*, 413 F.3d 548, 553 (6th Cir. 2005); *Jamison v. Collins*, 291 F.3d 380, 392 (6th Cir. 2002), instructing district courts to grant them, *e.g.*, *Hodge v. Hurley*, 426 F.3d 368, 389 (6th Cir. 2005); *Miller v. Webb*, 385 F.3d 666, 678 (6th Cir. 2004), or granting them itself, *e.g.*, *Clinkscale v. Carter*, 375 F.3d 430, 446 (6th Cir. 2004), *cert. denied*, 543 U.S. 1177 (2005). Such decisions would be meaningless if a habeas court could not order a noncompliant state to release a prisoner.

reasons stated in the margin.[6] Thus, we conclude that the district court acted well within its power by ordering Satterlee's immediate release.

B. Expungement

Finally, the state objects to the portion of the unconditional writ ordering the expungement of the record of Satterlee's conviction. *Satterlee II*, 2005 WL 2704877, at *3. The state argues that this remedy was improper because a district court's only power when granting a writ of habeas corpus is to order the release of the prisoner.

It appears that we have never expressly addressed whether habeas courts have the power to order the expungement of the record of a conviction. We conclude that they do. The habeas statute provides that "[t]he court shall . . . dispose of the matter *as law and justice require*." 28 U.S.C. § 2243 (emphasis added). Based on this broad language, the Supreme Court has explained that the remedial power possessed by habeas courts is not limited to ordering a prisoner's discharge from physical custody. *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968); *Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968). Accordingly, other circuits have already recognized the

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[6] From what we can determine, this is the state's argument: (1) if the state had made (and Satterlee had accepted) the offer mandated by the conditional writ, then Satterlee would now be in prison, subject to release only via parole; (2) thus, the subsequent grant of immediate release was a "usurpation of the authority of the Michigan Parole Board." Appellant Br. (05-2513) at 8. The state is basically asking us to ignore the well-settled precedent and practice (cited above) establishing that the consequence of a state's failure to comply with a conditional writ is release of the prisoner. We decline to do so. The state's argument also fails as a matter of common sense. Put in general terms, the state contends the following: (1) The law says you must do A, or else sanction B will be imposed; (2) even if it is undisputed that you failed to do A, you can avoid sanction B *simply by pointing out that if you had done A after all, then sanction B would not have been imposed*. We think it apparent that this argument is illogical and merits no further discussion.

power to order expungement. *A.M. v. Butler*, 360 F.3d 787, 802 (7th Cir. 2004); *United States v. Sumner*, 226 F.3d 1005, 1012 (9th Cir. 2000); *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993); *White v. White*, 925 F.2d 287, 292 (9th Cir. 1991); *Mizell v. Att'y Gen.*, 586 F.2d 942, 948 (2d Cir. 1978), *cert. denied*, 440 U.S. 967 (1979); *Woodall v. Pettibone*, 465 F.2d 49, 53 (4th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973); 2 HERTZ & LIEBMAN, *supra*, § 33.4, at 1688, 1698-99 ("[P]otentially appropriate remedies include . . . [o]rders requiring . . . expungement of criminal records . . . ."). Once again, the state cites no authority limiting the power of a habeas court in the manner that it suggests. Therefore, we affirm the unconditional writ's order of expungement.

C. Reprosecution

Although we affirm the district court's decision to order both Satterlee's immediate release and the expungement of his record of conviction, the unconditional writ leaves ambiguous an important issue: whether the state may reprosecute Satterlee. In a typical case in which a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, "the state is not precluded from rearresting petitioner and retrying him under the same indictment." *Fisher*, 757 F.2d at 791; *accord, e.g.*, *Foster v. Lockhart*, 9 F.3d 722, 727-28 (8th Cir. 1993); *Moore v. Zant*, 972 F.2d 318, 320 (11th Cir. 1992), *cert. denied*, 507 U.S. 1007 (1993); 2 HERTZ & LIEBMAN, *supra*, § 33.3, at 1686 ("[F]ederal courts usually permit rearrest and retrial after the time period specified in the conditional release order has elapsed and the prisoner has been released."). However, in "extraordinary circumstances," such as when "the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial," a habeas court may "forbid[] reprosecution." 2 HERTZ & LIEBMAN, *supra*, § 33.3, at 1685-86 (footnotes omitted). It is not clear whether the unconditional writ granted by the district court is unconditional (1) in the sense that it is effective immediately but reprosecution is permitted or (2) in the sense

that it bars reprosecution. Thus, we instruct the district court to clarify on remand which of these meanings it intended and, if it meant to forbid reprosecution, to justify its conclusion.[7]

V. CONCLUSION

For the reasons set forth above, we **AFFIRM** the grant of the conditional writ in No. 05-2013, **AFFIRM** the grant of the unconditional writ in No. 05-2513 with instructions to clarify, and **REMAND** for further proceedings consistent with this opinion.

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[7] If the district court permits reprosecution, it should also consider whether "law and justice require," 28 U.S.C. § 2243, the writ to include a provision mandating the state to reinstate the six-to-twenty-year offer if it ever chooses to reprosecute Satterlee. The ineffective assistance of counsel is "subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). "The only way to effectively repair the constitutional deprivation [the petitioner] suffered is to restore him to the position in which he would have been had the deprivation not occurred." *Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991). Where, as here, a defendant receives a greater sentence than one contained in a plea offer that he would have accepted if not for the ineffective assistance of counsel, the properly tailored remedy is to give the defendant the opportunity to accept the offer, because simply retrying the petitioner without making the plea offer would not remedy the constitutional violation that led to the issuance of the writ. *Turner v. Tennessee*, 858 F.2d 1201, 1208 (6th Cir. 1988) ("[T]he only way to neutralize the constitutional deprivation suffered . . . would seem to be to provide [the petitioner] with an opportunity to consider the State's two-year plea offer with the effective assistance of counsel."), *vacated on other grounds*, 492 U.S. 902 (1989); *Nunes v. Mueller*, 350 F.3d 1045, 1057-58 (9th Cir. 2003), *cert. denied*, 543 U.S. 1038 (2004); *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994); *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982); *see also Lewandowski*, 949 F.2d at 887, 889 (ordering release when the defendant had already served a longer sentence than would have been possible under a favorable plea offer); *Boria v. Keane*, 99 F.3d 492, 499 (2d Cir. 1996) (same), *cert. denied*, 521 U.S. 1118 (1997).

U S. DISTRICT COURT
EASTERN MICHIGAN
SOUTHERN DIVISION

FILED
Apr 15 2005
Clerk's Office
US District Court
Eastern Michigan

WYNN SATTERLEE
Petitioner

Civil No. 03-71682-DT
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

HUGH WOLFENBARGER,
Respondent.
_____/

OPINION AND ORDER GRANTING AN EVIDENTIARY HEARING ON PETITIONER'S SECOND. AND EIGHTH INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Wynn Satterlee, ("petitioner"), presently confined at the Macomb Correctional Facility in New Haven, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 26 U.S.C. § 2254. In his application, filed by attorney James Sterling Lawrence, petitioner challenges his conviction on one count of conspiracy to deliver over 650 grams of cocaine. For the reasons stated below, the Court will **GRANT** an evidentiary hearing with respect to three of petitioner's ineffective assistance of counsel claims.

I. Background

Petitioner was convicted of the above offense following a jury trial in the Ingham County Circuit Court and was sentenced to 20 to 30 years in prison.

Prior to trial, petitioner's counsel informed him that the Ingham County Prosecutor's Office was willing to negotiate a plea, whereby petitioner could receive a sentence of seven to twenty years in exchange for his cooperation, and a sentence of

ten to twenty years even without cooperating. Petitioner rejected this offer.

On November 30, 1998, approximately one week before trial, petitioner's trial counsel purportedly sent a letter to petitioner's home, informing him that the Ingham County Prosecutor had improved the plea offer and was now willing to offer petitioner a sentence of three to seven years in exchange for his cooperation, and seven to twenty years if he did not cooperate. Petitioner claims that he never received this letter from his counsel concerning the improved plea offer, learning about this letter only after his appeal of right had concluded and when his trial counsel, who had also represented petitioner on his appeal of right, forwarded petitioner his file. Petitioner claims that he had left the state of Michigan just prior to trial, to handle business matters in the state of Nevada. He further alleges that his counsel knew that he was out of state, because the two men had spoken by telephone. Petitioner claims that his counsel made no other attempts to communicate the improved plea offer to him, even though counsel was aware that petitioner was not in the state of Michigan prior to trial. In an affidavit, petitioner's current counsel, James Sterling Lawrence, claims that he spoke with the prosecuting attorney, John Cipriani. Cipriani denied that there was ever a plea offer of three to seven years, but purportedly admitted that a plea offer of six to twenty years was made to petitioner.

Petitioner was represented on his direct appeal by the same attorney who had represented him at trial. Petitioner's conviction was affirmed on appeal. *People v. Satterlee*, 217262 (Mich.Ct March 28, 2000); *lv. den.* 462 Mich. 902; 659 N.W. 2d 227 (2000). Petitioner thereafter filed a post-conviction motion for relief from judgment pursuant to M.C.R. 6.500, *et. seq.*, which the trial court denied. *People v. Satterlee*, 98-73173-FH (Ingham County Circuit Court, July 24, 2001), The Michigan appellate courts denied petitioner leave to appeal pursuant to M.C.R. 6.508(D). *People v. Satterlee*, 242009 (Mich.Ct.App. November 4, 2002); *lv. den.* 468 Mich. 894; 061

N.W. 2d 241 (2003). Petitioner now seeks the issuance of a writ of habeas corpus on the following grounds:

I. Petitioner had ineffective assistance of counsel relating to plea negotiations.

II. Petitioner never rejected the prosecutor's offer because he never heard of it, and did cooperate, therefore, he should be permitted to accept the offer now.

III. Untruthful or perjured testimony and prosecutor argument justifies the grant of a new trial.

IV. Petitioner had ineffective assistance of counsel where counsel used the wrong rule to seek admission of evidence, and rebuffed the judge's suggestion about the right rule.

V. Petitioner had ineffective assistance of counsel where counsel failed to object to argument and profile testimony about characteristics of drug dealers.

VI. Petitioner had ineffective assistance of counsel where counsel failed to object to leading questions that changed a witness's testimony.

VII. Petitioner had ineffective assistance of counsel where counsel failed to object to argument shifting the burden of proof.

VIII. Petitioner was prejudiced by ineffective assistance of appellate counsel, where counsel failed to raise issues including ineffective assistance of counsel against himself.

II. Discussion

The Court will discuss petitioner's first, second, and eighth ineffective assistance of counsel claims together for purposes of judicial clarity.

1. *Standard of Review*

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the resumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland*, 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. Id. The Strickland standard applies as well to claims of ineffective assistance of appellate counsel. See *Johnson v. Warren*, 344 F. Supp. 2d 1081, 1095 (E.D. Mich. 2004).

2. *The individual claims.*

A. Petitioner is entitled to an evidentiary hearing on his first, second and eighth ineffective assistance of counsel claims.

In his first and second claims, petitioner contends that his trial counsel was ineffective for failing to adequately communicate a plea bargain offer that had been made to him by the prosecutor prior to trial. As part of his eighth claim, petitioner contends that his counsel was ineffective for not raising this ineffective assistance of counsel claim on his direct appeal. Respondent contends that all of petitioner's claims are procedurally defaulted, because he raised them for the first

time in his post motion and the Michigan appellate courts denied petitioner leave to appeal pursuant to M.C.R. 6.508(D).

Assuming that the state trial court's decision constituted an invocation of the procedural bar found in M.C.R. 6.508(D)(3), petitioner contends that any such default should be excused because of the ineffective assistance of appellate counsel. If petitioner can show that he received ineffective assistance of appellate counsel that rose to the level of a Sixth Amendment violation, it would excuse his procedural default for failing to raise his claims on his direct appeal in the state courts. *Seymour v. Walker*, 224 F. 3d 542, 550 (6th Cir. 2000).

In the present case, petitioner argues that any default for failing to raise his claims on direct appeal should be excused because he was deprived of the effective assistance of appellate counsel, in part because he was represented on direct appeal by the same attorney who represented him at trial. A number of cases have excused a habeas petitioner's failure to raise an ineffective assistance of trial counsel claim on his direct appeal, where the petitioner was represented on appeal by the same attorney who represented him at trial. *See e.g. Combs v. Coyle*, 205 F. 3d 269. 275-77 (6th Cir, 2000); *Osborn v. Shillinger*, 861 F. 2d 612, 623 (10th Cir. 1988); *Alston v. Garrison*. 720 F. 2d 812, 816 (4th Cir, 1983); See also *Whiting v. Burt* 395 F. 3d 602 (6th Cir. 2005)(fact that attorney who represented petitioner on direct appeal also served as petitioner's attorney at trial might serve as cause for petitioner's failure to assert on direct appeal any claims based on ineffective assistance of trial counsel, although petitioner would be required to show prejudice before the default could be excused).

Moreover, petitioner could not have procedurally defaulted his ineffective assistance of appellate counsel claim, because state post-conviction review was the first opportunity that he had to raise this claim. See *Hicks v. Straub*, 377 F. 3d 538, 558, n. 17 (6th Cir. 2004); *Johnson v. Warren*, 344 F. Supp. 2d at 1069, n. 1.

This Court concludes that petitioner's first two ineffective assistance of counsel claims and his ineffective assistance of appellate counsel claim are not procedurally defaulted. The next question becomes whether petitioner is entitled to an evidentiary hearing on these claims.

A federal court must grant an evidentiary hearing to a habeas corpus applicant if:

> (1) the merits of the factual dispute were not resolved in a state hearing;
> (2) the state factual determination is not fairly supported by the record as a whole;
> (3) the fact finding procedure in state court was not adequate to afford a full and fair hearing;
> (4) there is a substantial allegation of newly discovered evidence;
> (5) material facts were not adequately developed at a state court hearing; or
> (6) for any reason it appears that state trier of fact did not afford applicant a full and fair fact hearing.

Townsend v. Sam, 372 U.S. 293, 313 (1963); 28 U.S.C.A. § 2243.

One of the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) states that if an applicant for a writ of habeas corpus has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that:

> (A) the claim relies on:
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have

> been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C 2254 (e)(2).

Under the opening clause of § 2254 (e)(2), a failure to develop the factual basis of a claim by a habeas petitioner is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or prisoner's counsel. *Williams v. Taylor*. 529 U.S. 420, 432 (2000). Diligence for purposes of the opening clause of this subsection of the AEDPA depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend upon whether those efforts would have been successful. *Id*. at 435. Diligence will require that the petitioner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law. *Id*.

Federal-state comity is not served by stating that a prisoner has "failed to develop the factual basis of a claim" where he was unable to develop his or her claim in state court despite diligent efforts to do so. In that circumstance, an evidentiary hearing is not barred by U.S.C. 2254 (e)(2). *Williams v. Taylor*, U.S. at 437. If there is no lack of diligence at the relevant stages in the state proceedings, a petitioner has not failed to develop the facts under the opening clause of the AEDPA governing whether a federal habeas petitioner may obtain an evidentiary hearing on a claim for which a petitioner has failed to develop a factual basis in state court proceedings, and petitioner will be excused from showing compliance with the balance of the subsection's requirements. *Id*.

The Court finds that petitioner is entitled to an evidentiary hearing on these ineffective assistance of counsel claims. In the present case, petitioner alleges that his trial counsel failed to adequately convey a plea bargain offer to him prior to trial. Petitioner has attached a letter from his trial counsel dated November 30, 1998, in which counsel informed petitioner that the Ingham County Prosecutor was willing to offer a sentence of three to seven years in exchange for his cooperation, and seven to twenty years without his cooperation. Petitioner claims in an affidavit that he never received this letter, iii part, because he had gone to the State of Nevada on business. Petitioner alleges, however, that his counsel knew that he was in Nevada, because the two had spoken on the telephone, but never attempted to contact petitioner in Nevada to inform him of the plea bargain offer. In his affidavit, petitioner claims that his wife told him that this letter from counsel never arrived at their home. Petitioner's current counsel, James Sterling Lawrence, has also signed an affidavit, in which he claims that the prosecutor in this case informed him that there was a plea offer of six to twenty years made to petitioner prior to trial, in his affidavit, petitioner claims that he was never informed about this plea bargain offer. Petitioner indicates that had he been informed of this plea bargain offer, he would have accepted the offer, even though he had preferred a better plea bargain offer.

This Court concludes that petitioner is entitled to an evidentiary hearing on these ineffective assistance of counsel claims. By requesting an evidentiary hearing on his ineffective assistance of counsel claims in his state post-conviction proceedings, petitioner demonstrated due diligence, for purposes of § 2254(e)(2). *See Greer v. Mitchell*, 264 F. 3d 664, 681 (6th Cir. 2001); *Alexander v. Smith*, 342 F. Supp. 2d 677, 690, n. 6 (E.D. Mich. 2004).

Secondly, petitioner has stated a claim, which if true, could entitle him to habeas relief. A defense attorney's failure to notify his client of a prosecutor's plea bargain offer constitutes defective performance, for the purpose of a claim of

ineffective assistance of counsel. See *Griffin v. United States*. 330 F. 3d 733, 737 (6th Cir. 2003). The second element of the Strickland test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice, *Id.* The Sixth Circuit has declined to hold that a defendant must support his own assertion that he would have accepted the plea offer with additional objective evidence and "substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer." *Id.* at 737. In this case, petitioner received a sentence of twenty to thirty years after trial. Clearly, the large disparity between this sentence and a sentence of six to twenty years, or less, if the letter from petitioner's counsel is to be believed, could support a finding that there is a reasonable probability that petitioner would have accepted either of the plea offers that were allegedly made in this case.

In the present case, factual questions as to the nature and quality of advice that petitioner received from counsel concerning any plea agreements that were offered by the state entitle petitioner to an evidentiary hearing on his ineffective assistance of counsel claim. *See Smith v. United States*, 348 F, 3d 545 553 (6th Cir. 2003). In addition, because the affidavits submitted in this case are scanty and conflicting regarding the precise nature of the plea bargain offer made, an evidentiary hearing is also necessary. *See Pitcher v. Huffman*, 65 Fed. Appx. 979, 983-84 (6th Cir. 2003). Finally, because petitioner claims that he would have accepted the plea offer had he known of it, the claim of prejudice also requires an evidentiary hearing to determine the credibility of petitioner's allegations. *See Sims v. United States*, 343 F. Supp. 2d 621, 624 (E.D. Mich. 2004).

Accordingly, this Court concludes that petitioner is entitled to an evidentiary hearing on his claims that his trial counsel failed to communicate any plea bargain offers to him

that were offered by the Ingham County Prosecutor. Petitioner is also entitled to an evidentiary hearing on his related claim that his counsel was ineffective for failing to raise this ineffective assistance of counsel claim on petitioner's direct appeal.

III. CONCLUSION

Based upon the foregoing, the Court concludes that petitioner is entitled to an evidentiary hearing on his first and second ineffective assistance of counsel claims involving his trial counsel's alleged failure to advise him of a plea bargain offer made by the prosecutor and his related eighth claim involving appellate counsel's failure to raise this claim on direct appeal.

/s Arthur J. Tarnow

HON. ARTHUR J. TARNOW
UNITED STATES DISTRICT COURT

dated: APR 15, 2005

PURSUANT TO RULE 77(D), FRCivP
COPIES HAVE BEEN MAILED TO ALL
ATTORNIES FOR ALL PARTIES ON
APR 15, 2005

s/ Cathy A. Pickles

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WYNN SATTERLEE,
Petitioner,

v.

Civil No. 03-71682-DT
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

HUGH WOLFENBARGER,
Respondent.

OPINION AND ORDER CONDITIONALLY GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS[1]

Wynn Satterlee, ("petitioner"), presently confined at the Macomb Correctional Facility in New Haven, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction on one count of conspiracy to deliver over 650 grams of cocaine. For the reasons stated below, petitioner's application for writ of habeas corpus is **CONDITIONALLY GRANTED.**

I. Background

Petitioner was convicted following a jury trial in the Ingham County Circuit Court and was sentenced to 20 to 30 years in prison.

On April 15, 2005, this Court granted petitioner an evidentiary hearing on his ineffective assistance of counsel claims. This Court further found at the time, for reasons stated in greater detail in its opinion and order, that petitioner's claims were not procedurally defaulted.[2]

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[1] Staff Attorney Daniel H. Besser provided quality research assistance.
[2] Opinion and Order attached as Appendix A to this Opinion.

In his first and second claims, petitioner alleged that his trial counsel was ineffective for failing to adequately communicate a plea offer that had been made to him by the prosecutor prior to trial. As part of his eighth claim, petitioner contends that this same counsel was ineffective for not raising his own ineffectiveness at trial as a claim on petitioner's direct appeal.

An evidentiary hearing was conducted on June 1, 2005. The first witness to testify was petitioner's trial and appellate counsel, David Dodge. Mr. Dodge testified that petitioner had been charged with conspiracy to deliver 650 grams or more of cocaine. Dodge indicated that the penalties for this offense were either twenty to thirty years in prison or mandatory life in prison without parole. Dodge indicated that his office was retained by petitioner on May 28, 1998. Petitioner's first attorney, Thomas Bengston, remained on the case as a consultant to the defense.

Dodge testified that when he was first retained by petitioner, the prosecution had made a plea offer with a sentence agreement of twelve to twenty years. Dodge admitted that he was aware that shortly after his arrest, petitioner had made a statement to police officials in Ingham County, in which he detailed his involvement in cocaine trafficking. Dodge knew that petitioner cooperated with police authorities so that he could obtain pretrial release on bond. Dodge acknowledged that one purpose of a defendant's proffer to the police concerning his or her involvement in drug trafficking activities would be to obtain a plea bargain from the prosecutors. Dodge had no recollection of petitioner and him meeting with the prosecutor and law enforcement officials for proffer discussions on November 10, 1998, the date of a pre-trial conference.

Dodge testified further that he engaged in discussions with Assistant Prosecutor John Cipriani concerning a plea. Dodge testified that petitioner had authorized him to accept a sentence agreement of no greater than one to twenty years.

Dodge identified Plaintiffs Exhibit 3 as a letter that he sent to petitioner on November 30, 1998. In this letter, Dodge informed petitioner that the prosecutor's office was offering seven to twenty years without any cooperation from petitioner, and was offering a resolution of three to seven years if petitioner agreed to cooperate. Dodge was unsure whether this letter had been sent by mail to petitioner or transmitted by fax machine, or both. Dodge was unsure whether he had any conversations with petitioner between November 30, 1998 and the first day of trial, December 7, 1998.

Mr. Dodge was asked by petitioner's current counsel whether Assistant Prosecutor John Cipriani ever made a plea offer regarding a six to twenty year sentence. Dodge replied that at one point, Cipriani's offer fell below a minimum seven year sentence, but that this was dependent upon petitioner's full and complete cooperation. However, Dodge testified further that such a deal was never consummated, because he did not have any authority from petitioner to negotiate a sentence bargain greater than one to twenty years.

Dodge did not recall any discussions on the morning of trial concerning any plea offers, claiming he could not remember whether any plea offer even remained open on the day of trial. Upon further questioning, Dodge conceded that the prosecution had a strong case against petitioner. Dodge acknowledged that in such cases, plea negotiations are important and should take place. Dodge also testified that although there was an agreement between himself and Mr. Cipriani that petitioner's proffer statement could not be used as direct evidence against him if he went to trial, the proffer statement could have been used to impeach petitioner's credibility had he chosen to testify at trial.

Dodge testified that the fee arrangement between himself and petitioner called for petitioner having to pay higher fees if the case went to trial. Dodge explained that the initial

retainer fee was $25,000.00, with an additional fee of $25,000.00 if petitioner went to trial.

Dodge further testified that he was retained by petitioner's family immediately after sentencing to represent petitioner on appeal. Dodge testified that he received $5,000.00 for the appeal. Although Dodge testified that he had handled other appeals from criminal cases where he had been trial counsel, he acknowledged that he never raised an ineffective assistance of trial counsel claim against himself.[3]

On cross-examination, Dodge testified that he did not recall whether a plea offer had been made on the day of trial, but insisted that he would have communicated such an offer to petitioner.

John Cipriani testified that he was the assistant prosecutor assigned to petitioner's case. Cipriani testified that petitioner had been charged with delivery or possession with intent to deliver over 650 grams of a controlled substance. The penalty for this crime was either twenty to thirty years or life imprisonment.

Cipriani acknowledged that after petitioner was extradited from Nevada to Michigan to face the charges, petitioner was given an opportunity by law enforcement officials to proffer a statement, in which petitioner would provide information concerning his drug dealing activities. Cipriani related that he and the police would make a plea offer based on the nature of the information proffered by a defendant. Cipriani indicated further that if a defendant wanted to continue to cooperate, he or she could potentially obtain a more advantageous plea offer. Cipriani testified that petitioner

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[3] This Court previously found that any procedural default of petitioner's ineffective assistance of trial counsel claims was excused in part by the fact that he was represented by the same attorney on his appeal of right. See Appendix A, p. 6.

initially made a four page statement on February 12, 1998 to the police, in which he detailed his knowledge and participation in the distribution of cocaine. Cipriani was unaware of any occasion in which petitioner refused to cooperate with authorities.

Cipriani testified that the first plea offer made to petitioner was for him to receive a sentence agreement of twelve to twenty years. Eventually, the plea offer improved from twelve to twenty years to seven to twenty years. Prior to trial, there was a firm offer of seven to twenty years. Cipriani denied making any plea offers in the three to seven years range.

Finally, on the day of trial, Cipriani offered petitioner six to twenty years in prison in exchange for his plea of guilty. Cipriani testified that the offer of six to twenty years did not require any further cooperation from petitioner. Cipriani testified that he communicated this offer to petitioner's counsel, David Dodge. He did not communicate the plea offer directly to petitioner. Although he observed discussion between Dodge and petitioner, Cipriani conceded that he had no personal knowledge about whether Dodge communicated this offer to petitioner. Cipriani did not hear petitioner inform Dodge that he refused to accept this plea offer instead, Dodge returned to Cipriani "and said we're going to have a trial or that's not good enough, or something to that effect."

Petitioner testified that after his arrest on this charge, he made a four page statement to the police in which he described his involvement in drug trafficking. Petitioner indicated that the purpose of his proffer was to cooperate in order to obtain some reduction in the charges. Petitioner was aware that he was facing life in prison on this charge.

Petitioner's first attorney, Thomas Bengston, informed him that the prosecutor's initial plea offer was twelve to twenty years. Petitioner rejected the offer as being too high, but he continued to cooperate with the police. Petitioner met in Mr. Bengston's office with narcotics officers on four or five dates,

where he provided the officers with information concerning narcotics trafficking. On one of these occasions, agents from the Federal Bureau of Investigation also questioned him. Petitioner testified that he never refused to cooperate.

Petitioner indicated that he contacted David Dodge in April of 1998 and retained him as counsel. Petitioner testified that he hired Dodge because of his reputation in obtaining advantageous plea bargains for his clients. After Dodge was retained, petitioner testified that he met on two more occasions with the police to provide them with information.

Petitioner testified that several other plea offers were related to him by Dodge. Dodge and Bengston advised petitioner of an offer calling for an eight year minimum sentence, which petitioner rejected as being too high. Subsequently, petitioner met with Dodge, Cipriani, and several police officers following his pre-trial hearing on November 10, 1998. At this meeting, petitioner again gave information to the officers. Petitioner claimed that he was doing this, in order to "seek the very best deal I could get."

Prior to trial, petitioner received permission from the state trial court to go to the State of Nevada on business. Petitioner was shown Plaintiffs Exhibit 3, the letter dated November 30, 1998, which advised petitioner of the offer of seven to twenty years. Petitioner testified that he never saw this letter prior to his trial. Petitioner states that he was no longer living at the Timberidge Drive address listed on the letter, having moved to another address in September. Petitioner testified that he had previously advised his counsel about his new address. Petitioner further indicated that he was never verbally advised of the seven to twenty year sentence agreement that was mentioned in the letter.

On December 4th, the Friday prior to trial, petitioner telephoned Dodge, who informed petitioner that all plea offers "were off the table" and they were proceeding to trial. Petitioner was shocked at this news, because he had cooperated

with the authorities for almost a year in order to obtain a plea bargain.

Petitioner testified that Dodge never informed him on the day of trial about the six to twenty year sentence that was being offered to him, nor did he hear John Cipriani, the assistant prosecutor, make such an offer. Petitioner denied making any statements to either his attorney or the prosecutor on the day of trial, in which he rejected any plea offers. Petitioner testified that he would have accepted the plea bargain offer of six to twenty years in prison had it been communicated to him.

Petitioner acknowledged that the fee agreement in this case called for Mr. Dodge to receive more money if he went to trial. Petitioner denied that he personally contacted Dodge to represent him on appeal.

On cross-examination, petitioner denied ever telling Dodge that he would only accept a plea bargain with a sentence agreement of one to twenty years in prison. In response to a question from this Court, petitioner indicated that it was his posture throughout the entire pre-trial period that he was going to be pleading guilty. Petitioner was also aware that any plea agreement would involve prison time.

Petitioner's mother, Margaret Satterlee, testified that she never received a copy of the letter dated November 30, 1998, which contained the plea offer of seven to twenty years. Ms. Satterlee confirmed that the fee agreement with Dodge called for him to receive more money if the case went to trial. Ms. Satterlee further testified that after petitioner was sentenced, Mr. Dodge approached her in court about handling the appeal. Ms. Satterlee was never aware of any plea offer of six to twenty years.

Petitioner now seeks the issuance of a writ of habeas corpus on the following grounds:

I. Petitioner had ineffective assistance of counsel relating to plea negotiations.

II. Petitioner never rejected the prosecutor's offer because he never heard of it, and did cooperate, therefore, he should be permitted to accept the offer now.

III. Untruthful or perjured testimony and prosecutor argument justifies the grant of a new trial.

IV. Petitioner had ineffective assistance of counsel where counsel used the wrong rule to seek admission of evidence, and rebuffed the judge's suggestion about the right rule.

V. Petitioner had ineffective assistance of counsel where counsel failed to object to argument and profile testimony about characteristics of drug dealers.

VI. Petitioner had ineffective assistance of counsel where counsel failed to object to leading questions that changed a witness's testimony.

VII. Petitioner had ineffective assistance of counsel where counsel failed to object to argument shifting the burden of proof.

VIII. Petitioner was prejudiced by ineffective assistance of appellate counsel, where counsel failed to raise issues including ineffective assistance of counsel against himself.

II. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

III. Discussion

Petitioner contends in his first and second claims that his trial counsel was ineffective for failing to adequately communicate a plea offer that had been made to him by the prosecutor prior to trial.

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland*, 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. *Id.*

The Court finds that petitioner is entitled to habeas relief on his ineffective assistance of counsel claims. A defense attorney's failure to notify his client of a prosecutor's plea bargain offer constitutes defective performance, for the purpose of a claim of ineffective assistance of counsel. See *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); See also *Rompilla v. Beard*, ---- S. Ct.----; 2005 WL 1421390, * 8-9 (U.S. June 20, 2005)(trial counsel has a reasonable duty to investigate defendant's case). The second element of the Strickland test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice. *Griffin*, 330 F. 3d at 737. The Sixth Circuit has declined to hold that a defendant must support his own assertion that he would have accepted the plea offer with additional objective evidence and "substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer." *Id.* at 737.

This Court first finds that the petitioner has established by clear and convincing evidence that the prosecutor made a plea offer on the day of trial to allow petitioner to plead guilty

in exchange for a sentence of six to twenty years. Mr. Cipriani, the assistant prosecutor in this case, acknowledged that such a plea offer was made, and this fact has not been disputed by respondent.

Secondly, this Court finds that the plea offer of six to twenty years was never communicated to petitioner by his attorney David Dodge. In so ruling, this Court is finding that petitioner's testimony that no such offer was ever conveyed to him prior to trial to be more credible than Mr. Dodge's testimony. Although Mr. Dodge claimed that it would be his practice to communicate all plea offers to a client, Mr. Dodge was unable to recall whether a plea offer was made on the day of trial or whether he discussed such an offer with petitioner.

More importantly, in all aspects, this Court finds petitioner's testimony, the testimony of his mother, and that of assistant prosecutor John Cipriani, to be more credible than Mr. Dodge's testimony on a number of matters. It is the province of the district court before which a habeas corpus proceeding is taking place to make credibility determinations. See *Stidham v. Wingo*, 482 F. 2d 817, 820 (6th Cir. 1973).

Mr. Dodge had difficulty remembering most of the details of this case. This Court finds it hard to believe that an attorney would be unable to recall even the most basic details from a case in which he received a fee in excess of $50,000.00. In addition, although Mr. Dodge claimed that he was only authorized by petitioner to accept a plea offer of one to twenty years, Mr. Cipriani claimed that he never heard petitioner offer to plead guilty in exchange for a sentence of one to twenty years.

Further, petitioner and his mother both testified that the letter from November 30, 1998 which contained a reference to the plea offer of seven to twenty years, was never mailed or faxed to them at any address. Dodge conceded that he did not know if this letter had been mailed or sent by fax machine to petitioner. Dodge also could not recall having any discussions

with petitioner concerning any plea offers between the date that he sent this letter on November 30, 1998 and the trial date of December 7, 1998. This diminishes the credibility of Dodge's testimony that it would be his practice to communicate all plea offers to his clients. If this were the case, the Court questions why Dodge would have made no attempts to contact petitioner by telephone or other means prior to trial to determine whether petitioner was aware of the plea offer of seven to twenty years and whether it would be desirable for him to accept it. Finally, Dodge's testimony that any plea offers which went below a minimum sentence of seven years were conditioned upon petitioner providing additional cooperation to the authorities was refuted by John Cipriani's testimony that the offer of six to twenty years was not conditioned upon petitioner providing any additional assistance to the authorities.

Another factor which casts doubt on Dodge's credibility and enhances petitioner's credibility concerning whether the plea agreement of six to twenty years was actually communicated to petitioner is the fee arrangement, which called for Dodge to receive an additional $25,000.00 if the case went to trial, as opposed if petitioner pleaded guilty. The fee arrangement created a disincentive for Dodge to seek a plea agreement, further calling into question both his credibility at the evidentiary hearing and the effectiveness of his representation in this case. *See e.g. Winkler v. Keane*, 7 F. 3d 304, 307-08 (2nd Cir 1993)(contingency fee agreement, under which defense counsel was to receive additional $25,000 if defendant were acquitted or otherwise not found guilty, created an actual conflict of interest in murder prosecution. That is, defense counsel had a disincentive to seek a plea agreement, or to put forth mitigating defenses that would result in a conviction of a lesser included offense).

Moreover, petitioner clearly established that he sought to plead guilty from the time of his arrest. He was not interested in going to trial. Petitioner testified that he cooperated with law enforcement officials from the start in order to obtain the most advantageous plea agreement.

Petitioner, in fact, testified that he retained Dodge, because of the attorney's reputation in obtaining favorable plea or sentencing agreements for his clients.

Finally, petitioner received a sentence of twenty to thirty years after trial. Clearly, the large disparity between this sentence and a sentence of six to twenty years supports a finding that there is a reasonable probability that petitioner would have accepted the plea offer that was made in this case. *Griffin*, *supra* at 737. See also, *United States v Blaylock*, 20 F3d 1458, at 1468 (6th Cir.1994). The question becomes what the appropriate habeas remedy would be in this case. A federal habeas court has broad discretion in conditioning a judgment granting habeas relief. *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). 28 U.S.C. § 2243 authorizes federal courts to dispose of habeas corpus matters "as law and justice require". In certain circumstances, federal courts have conditioned the issuance of a writ on the state's conducting proceedings narrower than a full retrial. See *Henderson v. Frank*, 155 F. 3d 159, 168 (3rd Cir. 1998). Such cases make clear that conditional writs must be tailored to ensure that all constitutional defects will be cured by the satisfaction of that condition. Id. Cases involving deprivations of the Sixth Amendment right to the assistance of counsel are likewise subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation. *United States v. Morrison*, 449 U.S. 361, 364 (1981). The most appropriate habeas remedy is to grant a writ of habeas corpus conditioned upon the State of Michigan permitting petitioner to plead guilty to a lesser offense with a sentence agreement of six to twenty years.

Because this Court's conclusion that petitioner is entitled to habeas relief on this first and second claims is dispositive of the petition, the Court considers it unnecessary to review petitioner's other claims and declines to do so.

III. ORDER

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO OFFER PETITIONER A PLEA OFFER WITH A SENTENCE AGREEMENT OF SIX TO TWENTY YEARS WITHIN SIXTY (60) DAYS OF THE DATE OF THIS OPINION, HE MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HIM FROM CUSTODY FORTHWITH.

s/Arthur J. Tarnow
HON. ARTHUR J. TARNOW
UNITED STATES DISTRICT COURT

Dated: 6/23/05

United States District Court

EASTERN DISTRICT OF MICHIGAN

Filed
Jul 8 2005
Clerk's Office
US District Court
Eastern Michigan

HUGH WOLFENBARGER,
Respondent.

v.

ORDER SETTING CONDITIONS OF RELEASE

WYNN SATTERLEE #278446
Petitioner
_____/

Case Number 03-71682
Judge Tarnow

IT IS ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing before any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed as directed. The defendant shall appear at (if blank, to be notified) _____
Place

_____ on _____
Date and Time

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(X) (4) The defendant promises to appear at all proceedings as required and to surrender for service or any sentence imposed.

(X) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of 10,000 dollars in the event of a failure to appear as required or surrender as directed for service of any sentence imposed.

* * *

Additional Conditions of Release

* * *

(X) (7) The defendant shall

(X) (a) report to the Pretrial Services Agency as directed

* * *

Acknowledgement of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release, I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

s/ Wynn Satterlee
Signature of Defendant

Address

City and Sate Telephone

Directions to United States Marshal

( ) The defendant is ORDERED released after processing.
( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: JUL 08 2005

s/ Arthur J. Tarnow
Signature of Judicial Officer

Name and Title of Judicial Officer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WYNN SATTERLEE,
Petitioner, Civil No. 03-71682-DT
HONORABLE ARTHUR J. TARNOW
v. UNITED STATES DISTRICT JUDGE
HUGH WOLFENBARGER,
Respondent.
_____/

OPINION AND ORDER GRANTING PETITIONER'S MOTION TO ISSUE AN UNCONDITIONAL WRIT OF HABEAS CORPUS AND DENYING RESPONDENT'S MOTION FOR STAY PENDING APPEAL

I. Background

On June 23, 2005, this Court granted a writ of habeas corpus to petitioner, on the ground that trial counsel's failure to convey to petitioner the prosecution's plea offer on the day of trial to allow petitioner to plead guilty in exchange for a sentence of six to twenty years constituted ineffective assistance of counsel. *See Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562 (E.D. Mich. 2005). This Court granted the writ, conditioned upon the State of Michigan offering to permit petitioner to plead guilty to a lesser offense with a sentence agreement of six to twenty years in prison within sixty days of the opinion, or petitioner could apply for a writ ordering his release. *Id.* at p. 569-70. On July 8, 2005, the Court released petitioner on an unsecured bond. The Court denied respondent's motion for reconsideration on July 14, 2005.

On September 23, 2005, petitioner filed a motion to issue an unconditional writ of habeas corpus, on the ground that respondent had failed to contact petitioner or his attorney within sixty days of this Court's order of July 14, 2005, which

denied respondent's motion for reconsideration, to offer petitioner the opportunity to plead guilty with a sentence agreement of six to twenty years. On October 3, 2005, respondent filed a motion for stay pending appeal. For the reasons stated below, the Court will order that an unconditional writ of habeas corpus issue in his case. The Court will deny respondent's motion for stay pending appeal.

II. Discussion

The Court will first address respondent's motion for a stay pending appeal. As noted above, the Court previously released petitioner on bond.

Because habeas proceedings are civil in nature, the general standards of governing stays of civil judgments should also guide courts when they must decide whether to issue a stay pending the state's appeal. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The factors regulating the issuance of a stay are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
> (2) whether the applicant will be irreparably injured absent a stay;
> (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding: and
> (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. at 776.

Where the state fails to show either that it has a strong likelihood of success on appeal or can demonstrate a substantial case on the merits, the preference for release of the petitioner should control. *Hilton*, 481 U.S. at 778.

Although this Court normally grants a respondent's motion for stay of proceedings pending the appeal of an order granting a writ of habeas corpus, the Court declines to do so in this case. First, and most importantly, the respondent is not entitled to a stay of proceedings pending appeal because she has failed to show either a strong likelihood of success on appeal or that she has a substantial case on the merits. See *Ward v. Wolfenbarger*, 340 F. Supp. 2d 773, 778 (E.D. Mich. 2004). Respondent does not even argue in her motion that she has a reasonable likelihood of prevailing on the merits of the appeal. More importantly, respondent has offered no case law in support of her motion to stay the appeal. Because respondent has failed to offer any case law in support of her motion to stay the proceedings, respondent has waived her argument on this issue. *Id.*

Moreover, it would be virtually impossible for respondent to show that she has a reasonable likelihood of prevailing on the merits on appeal. This Court conducted an evidentiary hearing on petitioner's ineffective assistance of counsel claim. As this Court indicated in its opinion granting habeas relief, it found petitioner's testimony that he was never informed by his attorney, David Dodge, of the plea offer of six to twenty years, to be more credible than Mr. Dodge's testimony. *Satterlee v. Wolfenbarger*, 374 F. Supp. 2d at 568. In particular although Mr. Dodge testified that it was his practice to communicate all plea offers to a client, Mr. Dodge was unable to recall whether a plea offer was made on the day of trial or whether he discussed such an offer with petitioner. Id. This Court also found, for reasons stated in greater detail in the opinion and order, that the testimony of petitioner, his mother, and assistant prosecutor John Cipriani was more credible than Mr. Dodge's testimony on a number of matters. This Court noted that: "is the province of the district court before which a habeas corpus proceeding is taking place to make credibility determinations." *Id.* (Citing *Stidharn v. Wingo*, 482 F.2d 817, 820 (6th Cir.1973).

In light of the fact that credibility determinations are virtually unassailable on appeal, this Court concludes that respondent is unable to show that she will likely prevail on appeal.

Secondly, respondent is not entitled to the issuance of a stay, because she has failed to show, much less argue, that she would be irreparably injured in the absence of a stay or that there would be any risk of harm to the public interest if a stay was not issued in this case. See *Ward v. Wolfenbarger*, 340 F. 3d at 778.

Finally, petitioner would suffer irreparable harm each day that he would remain under sentence in violation of the U.S. Constitution. Because "remedying such harm is the very essence of the writ of habeas corpus", *Ward v. Wolfenbarger*, 340 F. Supp. 2d at 778, respondent is not entitled to the issuance of a stay pending appeal.

The Court will also grant petitioner's motion for the issuance of an unconditional writ of habeas corpus. A federal district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case. *Phifer v. Warden, U. S. Penitentiary, Terre Haute, Ind* 53 F. 32d 859, 861 (7th Cir. 1995). A state's failure to timely cure the error identified by a federal district court in its conditional habeas order justifies the release of the petitioner. *Phifer*, 53 F. 3d at 864.

In this case, it is undisputed that respondent failed to offer petitioner an opportunity to plead guilty to a lesser offense with a sentence agreement of six to twenty years within sixty days of the Court's order granting the writ on June 23, 2005, or the Court's order denying the motion for reconsideration on July 14, 2005. Respondent also failed to obtain a stay of judgment pending appeal either from this Court or the Sixth Circuit within sixty days of either date. Respondent "to act in a timely fashion, and cannot preclude the issuance of the writ because the window of opportunity

afforded by the conditional order has passed." *Burdine v. Johnson*, 87 F. Supp. 2d 711, 716 (S.D. Tex. 2000).

This Court finds that the condition precedent contained within the conditional writ of habeas corpus was not complied with by respondent. Therefore, an absolute, or unconditional, writ of habeas corpus is granted to petitioner with instructions for the state court judgment of conviction to be vacated. See *Gentry v. Deuth*, 381 F. Supp. 2d 634, 638 (W.D. Ky. 2005). Accordingly, the judgment of conviction against petitioner for the offense of conspiracy to deliver over 650 grams of cocaine from the Ingham County Circuit Court from January 13, 1999 is vacated and the record of conviction shall be expunged. *Ward v. Wolfenbarger*, 340 F. Supp. 2d at 777. The Clerk of the Circuit Court of Ingham County, Michigan shall forward a copy of this Court's order to any person or agency that was notified of petitioner's arrest or conviction involved with this offense. *Id.* A certificate of compliance shall be filed with this Court within 30 days of the receipt of this order. *Id.*

III. ORDER

IT IS HEREBY ORDERED THAT Petitioner's Motion for Issuance of an Unconditional Writ of Habeas Corpus is GRANTED in accordance with the terms outlined in this opinion.

IT IS FURTHER ORDERED that Petitioner's 1999 conviction for Conspiracy to Deliver Over 650 grams of Cocaine be vacated and expunged from his records by the Clerk of the Circuit Court for Ingham County, Michigan in accordance with the terms outlined in this opinion.

IT IS FURTHER ORDERED THAT Respondent's Motion for a Stay Pending Appeal is DENIED.

s/Arthur J. Tarnow
Arthur J. Tarnow

United States District Judge

Dated: October 19, 2005

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 19, 2005, by electronic and/or ordinary mail.

s/Catherine A. Pickles
Judicial Secretary